

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

50964

FILE:

B-183440

DATE:

AUG 12 1975

MATTER OF:

97502

Leonard Ross - claim for backpay**DIGEST:**

Where new employee's entry on duty is delayed by 2 weeks because agency failed to comply with terms of its union agreement requiring posting of vacancy announcements for 15 days and automatic consideration of all eligible employees, employee is not entitled to pay for 2-week period in question absent administrative finding that he suffered withdrawal or reduction in pay as the result of an unjustified or unwarranted personnel action. Compare B-175372, April 21, 1972.

By letter of March 10, 1975, the Department of Agriculture, by its Authorized Certifying Officer, requests our opinion concerning the entitlement of one of its employees, Leonard Ross, to compensation for the period from December 16, 1974, to December 30, 1974. The December 16 date is that which Mr. Ross was originally informed was to be his date for reporting for duty, while the later date is his amended and actual reporting date.

The circumstances precipitating the 2-week delay in Mr. Ross' entry on duty are reported by the Certifying Officer as follows:

"On December 8, 1974, the Personnel Office notified Mr. Ross he had been selected for a position and to report for duty on December 16, 1974. He then notified his employer, The Monumental Life Insurance Corporation and terminated his employment with them on December 12, 1974. The afternoon of December 12, 1974, Personnel notified Mr. Ross they had made an error and the job announcement would be re-opened, posted back on the board, and that he would still be considered for the job. On December 26, 1974, our Personnel Office notified Mr. Ross he had been selected for the job and to report for duty on December 30, 1974.

"The above actions were necessary, since the Personnel Office violated the agreement with the Union

by requiring applicants to apply for the position. Merit Promotion Plan, Vacancy Announcement Number NFC-74-317, dated November 15, 1974, advertised a vacant position for the GS-335-5, Computer Aid. Included in the announcement was the following statement 'The performance factors of the position involve walking, lifting magnetic tape reels and boxes, shift work and irregular working hours. Because of these factors, employees interested in being considered for this vacancy must apply to the Personnel Office.' Agreement made between the National Finance Center and the American Federation of Government Employees Local 2341 provides under Article 12- Promotions 'Posting Vacancies: Vacancy announcements will be posted on the official bulletin board for a period of fifteen (15) calendar days. The announcement will contain a brief description of the position and the basic eligibility requirements. All eligible employees will be automatically considered for the position.'

In requesting our consideration of Mr. Ross' claim for 2 weeks compensation, the Department of Agriculture relies on our holding in B-175373, April 21, 1972, allowing the backpay claim of an employee whose entry on duty had been improperly prevented. It is urged that Mr. Ross' situation is similar in that he would not have been permitted to enter on duty on December 16 even if he had attempted to do so.

As a general proposition one is not entitled to compensation until his appointment has been fully consummated by taking of the oath of office. We have recognized an exception where one enters on duty and performs actual work prior to appointment, finding in that situation that his taking the oath of office related back to the date of his entrance on duty, B-181294, November 8, 1974. However, in the case where an employee has not actually entered on duty, he may be compensated only to the extent that his nonperformance of work is the consequence of his having undergone an unjustified or unwarranted personnel action within the terms of the Back Pay Act. It is within the ambit of this latter category that B-175373, supra, the case cited on Mr. Ross' behalf, falls.

Insofar as here pertinent, the Back Pay Act, codified at 5 U.S.C. 5596, authorizes payment of compensation as follows:

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

"(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

"(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation."

In B-175373, supra, the employee's initial offer of a position as a Customs security officer had been withdrawn some 5 days later. He nevertheless reported for work on the date indicated in the letter offering him employment, although he was not actually permitted to enter on duty. Subsequently, the would-be employee pursued his administrative remedy and successfully appealed to the Civil Service Commission which found that he had been legally appointed to the position in question as of the initially-ordered reporting date and had been improperly prevented from entering on duty. The determination by the Civil Service Commission was based on a legal finding that all pre-conditions to the individual's employment had been completed prior to

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his receipt of the letter attempting to withdraw the appointment. Pursuant to the Commission's ultimate determination that the Bureau of Customs' improper action was "tantamount to removal and discharge," and based on the above-quoted provision of the Back Pay Act, the individual was placed on the Bureau's rolls retroactively and received pay based on the date of his attempted entry on duty.

Unlike the situation of the Bureau of Customs employees discussed above, there has not been the administrative determination required by the Back Pay Act that the delay in Mr. Ross' reporting date was the result of an unjustified or unwarranted personnel action. In the absence of such determination, there is no basis for payment of Mr. Ross' claim for 2 weeks compensation. While it is the province of either the agency involved or the Civil Service Commission, and not of this Office, to render findings as to whether an individual has suffered a withdrawal or reduction in pay as the result of an unjustified or unwarranted personnel action, we note that the fact that the Department of Agriculture violated its union agreement in prematurely extending Mr. Ross an offer of employment would tend to negate any finding that all preconditions of his appointment had been met on December 5, 1974, when the personnel office first advised him of his selection.

For the foregoing reasons, the claim of Mr. Leonard Ross for compensation for the period between December 16 and December 30, 1974, is denied.

H. J. [REDACTED]

[REDACTED]

Comptroller General
of the United States